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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MARK J. FOURNIER,
Petitioner,

v.

CHARLES REARDON, Individually and in his capacity as Sheriff for the County of Essex, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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6PP

QUESTION PRESENTED

Whether, under the standard of Federal Rule of Civil Procedure 12(b)(6), the following allegations in a civil complaint brought pursuant to 42 U.S.C. §1983 describe a violation of the United States Constitution.

The plaintiff, a county corrections officer, attended as a recruit a nine week basic training academy operated by the county; in the course of such training, the plaintiff entered the training staff office without first requesting permission to do so; a defendant superior officer reprimanded the plaintiff for entering without first requesting permission to do so; said defendant, in the presence of other superior officers, then ordered the plaintiff to turn around and bend over; the plaintiff did so; said defendant then placed handcuffs on the plaintiff behind the plaintiff's back and informed the plaintiff that he was being placed under "House Arrest" for entering the staff office without first requesting permission. The plaintiff suffered serious personal injury minutes later, including a fractured vertebrae, as a result of being handcuffed.

LIST OF PARTIES

Petitioner,

Mark J. Fournier

Respondents,

Charles Reardon, Individually and in his capacity as sheriff for the County of Essex, Frank Cousins, in his capacity as sheriff for the County of Essex, John O'Brien, Christopher T. Casey, and Marguerite P. Kane in their capacity as Commissioners for Essex County, County of Essex, Timothy G. Donahue, Scott M. Rocheville, S. Michael Backry, Thomas Goff, and Mark W. Schmink

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark J. Fournier respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case.

CITATION OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the First Circuit is reported at 160 F.3d 754. It is reprinted in Appendix B at page 3a. The order of the District Court is not published. It is reprinted in Appendix C at page 13a.

BASIS FOR OF JURISDICTION IN THIS COURT

The Petitioner filed his complaint with the United States District Court for the District of Massachusetts on June 2, 1997. The Respondents filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court (Tauro, C.J.) denied the motion to dismiss on January 22, 1998. The Respondents filed a timely notice of appeal on February 20, 1998.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1998, reversing the order of the District Court and dismissing the Petitioner's complaint.

Federal jurisdiction in the United States District Court was based on the presence of a federal question 28 U.S.C. §1331. Jurisdiction on Appeal to the First Circuit Court of Appeals was pursuant to 28 U.S.C. §1291.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b):

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to

join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The Petitioner Mark J. Fournier, a corrections officer for the County of Essex in Massachusetts, sustained serious personal injuries on May 2, 1995 as a result of being handcuffed and placed under "House Arrest" by his superior, the Respondent Sergeant Timothy G. Donahue, while in the course of the Respondent's training at the County's Sheriff's Department Training Academy.

The Petitioner filed his complaint on June 2, 1997, in the United States District Court for the District of Massachusetts, pursuant to 42 U.S.C. §1983 and Massachusetts General Laws Chapter 12, §11I, based upon the Respondents' deprivation of, and interference with, rights of the Petitioner secured by the laws or Constitution of the United States, or by the laws or constitution of the Commonwealth of Massachusetts.

In his complaint, the Petitioner (plaintiff in said complaint) alleged the following facts:

"On May 1, 1995, the plaintiff reported as a recruit to the [Essex County Sheriff's Department Training] Academy to begin a nine week basic training course. Successful completion of the basic training course was a pre-requisite to the plaintiff continuing in his permanent, full-time employment as a corrections officer. There were approximately 20 other corrections officers who were also recruits in the basic training course with the plaintiff. App. E, p. 23a.

"On May 2, 1995, while performing classroom work at the Academy, the plaintiff was ordered to report to the Academy training staff office. The plaintiff so reported. The plaintiff entered the training staff office without first requesting permission to do so. Present in the staff office were the defendants [Sergeant] Donahue, [Lieutenant] Rocheville and [Lieutenant] Schmink. App. E, p. 23a.

"The defendant Donahue reprimanded the plaintiff for entering the staff office without first requesting permission to do so. The defendant Donahue then ordered the plaintiff to leave the staff office. The plaintiff did so. The defendant Donahue then ordered the plaintiff to turn around and bend over. The plaintiff did so. The defendant Donahue then placed handcuffs on the plaintiff behind the plaintiff's back and informed the plaintiff that he was being placed under 'House Arrest' for entering the staff office without first requesting permission. After then inserting written reports into the plaintiff's mouth, the defendant Donahue ordered the plaintiff back to his seat in the classroom and ordered the plaintiff to redo the reports in his mouth. App. E, pp. 23a-24a.

"The defendants Rocheville and Schmink observed defendant Donahue place the plaintiff under 'House Arrest.' The defendants Rocheville and Schmink were in a position of authority, and had the opportunity, to prevent or object to defendant Donahue placing the plaintiff under 'House Arrest', yet they made no attempt to do so by word or by deed. The defendants Rocheville and Schmink approved, condoned and acquiesced in the plaintiff being placed under 'House Arrest.' App. E, p. 24a.

"Approximately five minutes after being placed under 'House Arrest' and while still handcuffed, the defendant Donahue entered the classroom and ordered everyone to stand at attention, including the plaintiff. All recruits stood at attention, including the plaintiff. The defendant Donahue then ordered all recruits to sit in their seats. The plaintiff attempted to seat himself as previously instructed. However, because his hands were handcuffed behind him, the plaintiff missed his chair and fell to the ground, sustaining serious personal injuries, including a fractured vertebrae..." App. E, p. 24a.

"The use of 'House Arrest' as described herein was part of the basic training course administered by the training staff of the Academy. The use of 'House Arrest' as a part of said course served only to intimidate, punish, injure, humiliate and embarrass recruits, was arbitrary and capricious, and did not serve or advance any legitimate interest of the sheriff or the County of Essex..." App. E, p. 24a.

"The statements and acts of the defendant Donahue were made and committed by Donahue acting under color of state law. App. E, p. 32a.

"The statements and acts of the defendant Donahue deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;
b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;
c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and
d. his property rights in his employment as guaranteed by the Fourteenth Amendment." App. E, pp. 32a-33a.

ARGUMENT IN SUPPORT OF PETITION

This Court Should Grant The Petition For Writ Of Certiorari Because The Court Of Appeals For The First Circuit Has Entered A Decision In This Case Which Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

The Court of Appeals reversed the judgment of the District Court and entered judgment for the Respondents because the Court of Appeals concluded that the Petitioner's complaint fails to describe a violation of a federal right. In arriving at that conclusion, the Court of Appeals committed a fundamental error which departs from the accepted and usual course of judicial proceedings. The error was the failure of the Court of Appeals to accept as true the factual allegations in the Petitioner's complaint when assessing the

sufficiency of the complaint pursuant to a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Court of Appeals, contrary to the plain allegations in the complaint, concluded as a matter of law that the Petitioner had not been seized by Sergeant Donahue. More specifically, the Court of Appeals found that, "Although Fournier was handcuffed, no evidence presented would support a finding that he was not free to leave at any point during the scenario. Fournier understood that 'House Arrest' was part of the basic training academy course. [1] He submitted to being handcuffed, and then returned to the classroom. We grant that if he did object to being handcuffed, there could possibly have been negative consequences for his continued employment as a corrections officer. However, the possible effect that refusing to be handcuffed may have had on his employment status is not an issue for us to consider. Rather, the question is whether a violation of Fournier's right to be free from seizure occurred. In view of all the circumstances surrounding the incident, a reasonable observer would conclude that Fournier was the subject of improper hazing, which might give rise to a state law claim based on tort or

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[1] Nowhere in Petitioner's complaint is it stated that Fournier "understood that 'house arrest' was part of the basic training academy course." The Court of Appeals would therefore have no basis to draw such an inference against the Petitioner. Such an inference is directly contrary to the proper analysis of a motion to dismiss under Federal Rule of Civil Procedure 12 (b) (6). Even if the Petitioner had such an understanding, it would not have the effect of countenancing the Respondents' actions. See Pierson v. Ray, 386 U.S. 547, 558, 18 L. Ed. 2d 288, 297, 87 S. Ct. 1213 (1967)

employment theories, but would not believe that Fournier was not free to call an end to the 'house arrest' and have the handcuffs removed." App. B, pp.7a-8a. This conclusion departs from the accepted and usual standard used when testing the sufficiency of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

It was stated in Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S.Ct. 99(1957), "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. 355 U.S. at 45-46, 2 L. Ed. 2d at 84. Concomitant with such rule is the principle that all reasonable inferences are to be drawn in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 96, 94 S. Ct. 1683 (1974); Hernandez v. Coughlin, 18 F. 3d 133, 136 (2d Cir.) cert. denied, _____ U.S. _____, 115 S. Ct. 117, 130 L. Ed. 2d 63 (1994). Rather than adhering to these principles, the Court of Appeals instead found as a fact that the Petitioner voluntarily submitted to being handcuffed, justifying its position by quoting United States v. Mendenhall, 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980), for the proposition that "'[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' Mendenhall 446 U.S. at 554." App. B, p. 7a.[2] As if

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[2] Mendenhall, it should be noted, did not involve a Rule 12(b)(6) motion to dismiss. Rather, it involved a ruling made by a lower court after an evidentiary hearing on a motion to suppress evidence, after which the lower court made findings of fact.

illustrating the irony in the quote selected by the Court of Appeals, the very next sentence in the Mendenhall decision states, "Examples of circumstances that might indicate a seizure, **even where the person did not attempt to leave, would be the threatening presence of several officers**, the display of a weapon by an officer, some physical touching of the person of the citizen, or **the use of language or tone of voice indicating that compliance with the officer's request might be compelled**." Mendenhall, 446 U.S. at 554, 64 L. Ed. 2d at 509. (emphasis added) In the case at bar, Sergeant Donahue's tone of voice and use of language (an order) and the presence of two lieutenants clearly indicate that the Petitioner's compliance with Sergeant Donahue's orders might be compelled.

A "seizure" triggers the Fourth Amendment's protections when government actors have "by means of physical force or show of authority...in some way restrained the liberty of a citizen." Terry vs. Ohio, 392 U.S. 1, 19, n. 16, 20 L. Ed. 2d 889, 88S. Ct. 1868 (1968). Sergeant Donahue used handcuffs while placing the Petitioner under arrest. There cannot be any serious doubt about whether the Petitioner's liberty was restrained as a result of his being ordered to turn around and submit to being handcuffed. It also cannot seriously be argued that a reasonable person in the Petitioner's position would feel that he could disobey his superior officer's orders with impunity and simply walk away from Sergeant Donahue. Furthermore, the seizure was

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Indeed, the lower court found as a fact that the defendant in that case "gave her consent to the search [in the DEA office] and ... such consent was freely and voluntarily given." Id. 446 U.S. at 549, 64 L. Ed. 2d at 506. In contrast, the Petitioner has had no similar opportunity for such a finding to have been made in the case at bar.

unlawful because there was no reasonable suspicion, let alone probable cause, that the Petitioner had committed a crime.

As required by a §1983 claim, Sergeant Donahue's seizure of the Petitioner was made under color of law.[3] The Petitioner alleges that it was made under color of law, and the Petitioner also alleges that Sergeant Donahue made the seizure in his capacity as supervising instructor at the Academy and that the use of "House Arrest" was part of the basic training course administered by the training staff of the Academy. A "public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." West vs. Atkins, 487 U.S. 42, 50, 101 L. Ed. 2d 40, 50 108 S. Ct. 2250 (1988) (physician employed by state to provide medical services to state prison inmates acted under color of state law for purposes of §1983 when undertaking his duties in treating inmate's injuries). Moreover, Sergeant Donahue is a law enforcement officer. He is an officer appointed by the sheriff, superintendent or keeper of the jails or the house of correction. Massachusetts General Laws, Chapter 126, §16. See Commonwealth vs. Antonelli, 345 Mass. 518 (1963) (a guard in charge of prisoners at a county house of correction.). See also Commonwealth vs. Pettijohn, 4 Mass. App. Ct. 847 (1976). Sergeant Donahue, a deputy sheriff, is authorized to serve all

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[3] The Court of Appeals refers to the incident as an "improper hazing." Hazing typically refers to certain initiation activities for groups such as college fraternities which exact humiliating performances from initiates or playing rough practical jokes upon them. The actions in the case at bar might be thought to also fall into such activities except that Sergeant Donahue was acting under color of law when he seized the Petitioner, and not as a fellow fraternity member or upperclassman. cf. Skinner v. City of Miami, Fla., 62 F. 3d 344 (11th Cir., 1995).

manner of legal process, including criminal process, and therefore he may arrest. Massachusetts General Laws, Chapter 37, §11. Commonwealth vs. Howe, 405 Mass 332 (1989) (a deputy sheriff has authority to arrest). See Massachusetts General Laws, Chapter 276, §23.[4]

In the context of a claim pursuant to 42 U.S.C. §1983 that excessive force was used by a law enforcement officer in seizing a person, this Court has held in Graham vs. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) that such a claim is properly analyzed under the Fourth Amendment's "objective reasonableness" standard rather than under a substantive due process standard. Id., 490 U.S. at 388, 104 L. Ed. 2d at 450.

The Petitioner's claim comes within this holding. The fact that the Petitioner was a trainee in the Academy does not affect his Fourth Amendment rights.[5] Applying the "objective

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[4] G.L. c. 276, §23 provides: "Warrants and other processes issued for the apprehension of persons charged with crime may be directed to and served in any part of the Commonwealth by an officer authorized to serve criminal process in any county. Such officer may command aid and exercise the same authority as if in his own county."

[5] At the time he entered the Academy, the plaintiff had been a correction's officer for over ten years. He did not lose his Fourth Amendment rights because of his status as a correction's officer. Such rights apply to every free citizen. See U.S. vs. Kidd, 153 F. Supp. 605 (D.C. La 1957) (Defendant, an enlisted man in Air Force whose automobile was searched by an Air Force police officer, was entitled to have his rights against unreasonable searches and seizures judged by rules applicable to ordinary citizens). Accord, Matter of Teddington, 808 P. 2d 156, 116

reasonableness" standard of Graham vs. Connor requires a balancing of the nature and quality of the intrusion of the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Id., 490 U.S. at 396, 104 L. Ed. 2d at 455; Tennessee vs. Garner, 474 U.S. 1, 8, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985). In this case, the nature and quality of the intrusion was nothing short of a total seizure of the Petitioner's person with the use of handcuffs. The countervailing governmental issues are alleged to have been punishment for the Petitioner's entering the staff's office without permission. Certainly, viewed objectively, Sergeant Donahue's seizure of the Petitioner was completely unreasonable. Finally, it is irrelevant if the seizure took place in the context of official discipline, rather than in the setting of a true criminal proceeding, because the Fourth Amendment protections still apply. See Soldal vs. Cook County, 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992) ("...the protection against unreasonable searches and seizures fully applies in civil context." Id., 121 L. Ed. 2d 462, n. 11).

Accordingly, Sergeant Donahue's handcuffing the Petitioner was an "unreasonable...seizure" under color of law, in violation of the Petitioner's Fourth Amendment rights.

CONCLUSION

This case presents a question of fundamental importance to the accepted and usual course of judicial proceedings because the Court of Appeals wholly disregarded the appropriate standard for a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and instead drew

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Wash. 2d 761 (1991).

inferences in favor of the Respondents.

Accordingly, the Petitioner Mark J. Fournier respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1316

[Filed November 10, 1998]

MARK J. FOURNIER, Plaintiff, Appellant,	)	
v.	)	**JUDGMENT**
CHARLES REARDON,ETC., ET AL., Defendants, Appellees.	)	

Entered: November 10, 1998

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed in accordance with the opinion filed this day.

BY THE COURT:

Phoebe Morse, Clerk

/s/_____
JANICE M. 0'NEIL
Chief Deputy Clerk.

[cc: Messrs: Breen and Regan]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1316

[Filed November 10, 1998]

MARK J. FOURNIER,	)	**On Appeal from**
Plaintiff, Appellee	)	**the United States**
	)	**District Court for**
v.	)	**the District**
	)	**of Massachusetts**
CHARLES REARDON, ETC.,	)	
ET AL.,	)	
Defendants, Appellants.	)	

[Hon. Joseph L. Tauro, U.S. District Judge]
Before Torruella, Chief Judge,
Boudin and Stahl, Circuit Judges.

William P. Breen, Jr., with whom John J. Davis and Morrison, Mahoney & Miller were on brief, for appellants.
Thomas C. Regan, with whom Pearl, McNiff, Crean, Cook & Sheehan was on brief, for appellee.

TORRUELLA, Chief Judge. Defendant-appellants appeal the final order and judgment denying the defendants' motion to dismiss. Plaintiff-appellee, Mark J. Fournier ("Fournier"), claims that he is entitled to monetary damages

for personal injuries allegedly sustained as a result of the defendants' alleged deprivation of his rights under the Fourth and Fourteenth Amendments. Fournier asserts that the defendants are liable under the Federal Civil Rights Act, 42 U.S.C. § 1983, and under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § lll. For the following reasons, we reverse.

BACKGROUND Fournier was employed by the Essex County Sheriff's Department as a corrections officer for more than ten years prior to entering a basic training academy ("academy") run by the Essex County Sheriff's Department. On May 1, 1995, Fournier and twenty other corrections officers began attending a nine week basic training course which the Essex County Sheriff's Department required for full-time employment. The academy was staffed by other Essex County Sheriff's Department corrections officers. It offered both classroom and physical training such as standing at attention, instruction as to chain of command, and protocol in interacting with superior officers.

On the second day of the course, Fournier was ordered to report to the academy training staff's office. Protocol taught and enforced at the academy required that Fournier, an academy recruit: (1) knock outside the instructors' office door; (2) announce his presence; and (3) request permission to enter before entering the instructors' Office. Fournier breached academy protocol when he failed to follow this regimented procedure and entered the office unannounced.

To punish Fournier for violating academy protocol, one of the drill instructors present in the room ordered Fournier to turn around and bend over. When Fournier

complied, the drill instructor placed handcuffs on his wrists and informed Fournier that he was being placed under "house arrest" for entering the instructors' office without having requested permission. The drill instructor then allegedly put Fournier's written reports in his mouth and ordered him to return to the classroom. The other drill instructors in the room failed to intervene on Fournier's behalf

Fournier returned, in handcuffs, to the classroom. Within five minutes of the "house arrest," the drill instructor entered the classroom. Pursuant to academy protocol, the recruits rose to attention upon the entrance of a superior officer. When the drill instructor ordered the class to be seated, Fournier attempted to seat himself. Unfortunately, Fournier missed his chair and fell to the ground, allegedly sustaining serious personal injuries, including a fractured vertebra.

DISCUSSION

I. Standard of Review

Although most denials of motions to dismiss are not "final decisions," and thus are not independently appealable, a district court's rejection of a qualified immunity defense is a "final decision," Mitchell v. Forsyth, 472 U.S. 511, 528 (1985), and thus we review it here. Because "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all,"Siegert v. Gilley, 500 U.S. 226, 232 (1991), we will consider whether Fournier has asserted a violation of any constitutional right in his complaint.

II. Section 1983 Claims

Section 1983 states, in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights conferred.'" Graham v. Connor, 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). "To succeed, a section 1983 plaintiff must show a violation of a right secured by federal law." Skinner v. City of Miami, 62 F.3d 344, 346 (11th Cir. 1995).

Fournier claims three separate constitutional violations: (1) a violation of his Fourth Amendment rights; (2) a violation of his right to due process under the Fourteenth Amendment; and (3) a violation of his right to equal protection of the laws under the Fourteenth Amendment. None of his arguments is persuasive.

A. Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure against unreasonable . . . seizures, shall not be violated." U.S. Const. amend. IV. Under the Mendenhall test, formulated by Justice Stewart in United

States v. Mendenhall, 446 U.S. 544, 554 (1980), and adopted by the United States Supreme Court in later cases, see Michigan v. Chesternut, 486 U.S. 567, 573 (1988): "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554.

Furnier argues that when the drill instructor placed him under "house arrest" and handcuffed him behind his back, he was seized for purposes of Fourth Amendment analysis. We disagree. Under the Mendenhall test, a court must look at all the circumstances surrounding the incident to determine if a reasonable observer would have believed that Fournier was not free to leave.

Although Fournier was handcuffed, no evidence presented would support a finding that he was not free to leave at any point during the scenario. Fournier understood that "house arrest" was part of the basic training academy course. He submitted to being handcuffed, and then returned to the classroom. We grant that if he did object to being handcuffed, there could possibly have been negative consequences for his continued employment as a corrections officer. However, the possible effect that refusing to be handcuffed may have had on his employment status is not an issue for us to consider. Rather, the question is whether a violation of Fournier's right to be free from seizure occurred. In view of all the circumstances surrounding the incident, a reasonable observer would conclude that Fournier was the subject of improper hazing, which might give rise to a state law claim based on tort or employment theories, but would

not believe that Fournier was not free to call an end to the "house arrest" and have the handcuffs removed

B. Fourteenth Amendment Due Process Claims

The Fourteenth Amendment states that a "State [shall not] deprive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV. Due process claims may take either of two forms: "procedural due process" or "substantive due process." Pittsley v. Warish, 927 F.2d 3, 6 (lst Cir. 1991). Procedural due process requires that the procedures provided by the state in effecting the deprivation of life, liberty or property are adequate in light of the affected interest. Id. Substantive due process, however, imposes limits on what a state may do regardless of what procedural protection is provided. Id. (citing Monroe v. PaDe, 365 U.S. 167, 171-72 (1961); Rochin v. California, 342 U.S. 165, 169 (1952)). In this case, Fournier invokes the latter prong of due process protection: (1) by arguing that he had a constitutionally protected liberty interest in being disciplined only as set forth in the Essex County Sheriff's Department Training Manual; and (2) by contending that the county owed him and others similarly situated a constitutional right to safe conditions and freedom from bodily restraint.

1. Disciplinary Procedure Due Process Claim

It is well established that a state actor's failure to observe a duty imposed by state law, standing alone, is not sufficient to establish a § 1983 claim. See Martinez v. Colo, 54 F.3d 980, 989 (lst Cir. 1995). Although it is true that constitutional significance may attach to certain interests created by state law, not every transgression of state law does

double duty as a constitutional violation. Id. As this Court stated in Martinez: "[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations. . . ." Id.

Fournier cites Massachusetts law, see Mass. Gen. Laws ch. 265, § 40[1], and departmental regulations which govern the discipline of recruits in training programs, to found his claim of a § 1983 violation. However, whether Massachusetts law was violated or the department failed to follow its own disciplinary procedures matters little because

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[1] The statue provides:

Whoever, having the direct management or direct control over the conduct of physical exercise as part of a course of study or training program at any public or private institution, agency or entity, willfully, wantonly and recklessly causes serious bodily injury to a person participating in a course of study or training program involving physical exercise, shall be punished by a fine of not more than five thousand dollars or by imprisonment in a jail or house of correction for not more than two and one-half years or both.

For the purposes of this section "serious bodily injury" shall mean bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time.

neither alleged deficiency establishes a § 1983 violation.

2. Affirmative Obligation Due Process Claim

The substantive element of the Due Process Clause protects those rights that are fundamental, rights that are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). The Supreme Court has deemed that most, but not all, of the rights enumerated in the Bill of Rights are fundamental. In addition, certain unenumerated rights, such as the right to privacy, are deemed fundamental.

While the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to many areas. "Tort law is one such area that remains largely outside substantive due process jurisprudence." Skinner, 62 F.3d at 346 (citing Daniels v. Williams, 474 U.S. 327, 332 (1986) (noting that the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society")) (citations omitted).

Fournier contends that there is a constitutional right to safe conditions. But see DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195, 202 (1989) ("The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security .... A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were constitutionalized

by the Fourteenth Amendment.'" (quoting Daniels, 474 U.S. at 335)). Second, Fournier claims his constitutional right to freedom from bodily restraint was violated when he was handcuffed. As discussed above, Fournier's "house arrest" does not rise to the level of a constitutional violation. See supra, at 5-6. Fournier's Complaint attempts to conflate an ordinary tort--battery--into a constitutional violation. Unfortunately for his cause, not everything is a federal case.

3. Equal Protection Clause Claim

In a novel, yet utterly misguided attempt at an Equal Protection Clause claim, Fournier contends: "[The drill instructor] placed the plaintiff under house arrest because of the plaintiff's conduct as a recruit. It is fair to infer that . . . [the drill instructor] would not have placed a non-recruit under house arrest for similar conduct." Appellee's Br. at 13. We do not find that such a distinction rises to the level of an Equal Protection violation.

CONCLUSION

Because Fournier has not been able to show a violation of a federal right, it is not necessary for this Court to reach the defense of qualified immunity. For the reasons stated in this opinion, we reverse the judgment of the district court. Judgment is issued for the defendant-appellants.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed January 22, 1998]

MARK J. FOURNIER, Plaintiff, V. CHARLES REARDON, individually and in his capacity as Sheriff for the County of Essex, FRANK COUSINS, in his capacity as Sheriff for the County of Essex, JOHN W. O'BRIEN, in his capacity as Commissioner for Essex County, CHRISTOPHER T. CASEY, in his capacity as Commissioner for Essex County, MARGUERITE P. KANE, in her capacity as Commissioner for Essex County, TIMOTHY G. DONAHUE, SCOTT M. ROCHEVILLE, S. MICHAEL BACKRY, THOMAS GOFF, and MARK W. SCHMINK, Defendants.	**ORDER** **CA NO.** **97-CV-11230** **-JLT**

ORDER

January 22, 1998

TAURO, Ch.J.,

The court hereby orders as follows:

1. Defendants' Motion to Dismiss is DENIED;

2. Plaintiff may depose Charles Reardon, Frank Cousins, John W. O'Brien, Christopher T. Casey, Marguerite P. Kane, Timothy G. Donahue, Scott M. Rocheville, S. Michael Backry, Thomas Goff, and Mark Schmink;

3. Defendants may depose Mark J. Fournier and Dr. John Kazes, and may take a keeper of records deposition of Beverly Hospital;

4. Defendants' custodian of records shall search the files for the prior three years and shall produce any videotape or record pertaining to training procedures, especially ones referencing the "House Arrest" procedure. If no such records exist, then the custodian of records shall so state in an affidavit to be filed with the court no later than February 23, 1998;

5. All other discovery shall be completed by June 30, 1998;

6. No further discovery shall be permitted without leave of this court; and

7. The parties shall appear before this court for a further conference on July 15, 1998, at 10:00 a.m.

IT IS SO ORDERED.

/s/_____
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed August 13, 1997]

MARK J. FOURNIER, Plaintiff, V. CHARLES REARDON, individually and in his capacity as Sheriff for the County of Essex, FRANK COUSINS, in his capacity as Sheriff for the County of Essex, JOHN W. O'BRIEN, in his capacity as Commissioner for Essex County, CHRISTOPHER T. CASEY, in his capacity as Commissioner for Essex County, MARGUERITE P. KANE, in her capacity as Commissioner for Essex County, TIMOTHY G. DONAHUE, SCOTT M. ROCHEVILLE, S. MICHAEL BACKRY, THOMAS GOFF, and MARK W. SCHMINK, Defendants.	**DEFENDANTS' MOTION TO DISMISS CA NO. 97-CV-11230 -JLT**

DEFENDANTS' MOTION TO DISMISS

Defendants' Motion to Dismiss

The defendants, Charles Reardon, Frank Cousins, John O'Brien, Christopher T. Casey, Marguerite P. Kane, County of Essex, Timothy G. Donahue, Scott M. Rocheville, S. Michael Backry, Thomas Goff, and Mark W. Schmink, hereby move, pursuant to Fed. R.Civ. P. 12(b) (6), for this Court to enter an Order dismissing the plaintiff's Complaint.

As grounds therefor, the defendants state that the plaintiff has failed to allege facts which, even if proved, would amount to a federal constitutional violation. Accordingly, his civil rights claims must fail. In addition, the claims against the individual defendants must be dismissed based on their qualified immunity from suit. As further grounds for this Motion, the defendants rely on the Memorandum of Law filed contemporaneously herewith.

WHEREFORE, the defendants, Charles Reardon, Frank Cousins, John O'Brien, Christopher T. Casey, Marguerite P. Kane, County of Essex, Timothy G. Donahue, Scott M. Rocheville, S. Michael Backry, Thomas Goff, and Mark W. Schmink, respectfully request that this Court enter an Order dismissing the plaintiff's Complaint in its entirety.

The Defendants,
Charles Reardon, Individually and in his Capacity as Sheriff for the County of Essex, Frank Cousins, in his Capacity as Sheriff for the County of Essex, John O'Brien, Christopher T. Casey and Marguerite P. Kane, in their Capacity as Commissioners for Essex County, County of Essex, Timothy G. Donahue, Scott M. Rocheville, S. Michael Backry, Thomas

Goff and Mark W. Schmink,

By their attorneys:

MORRISON, MAHONEY & MILLER
/s/_____
John .J. Davis, BBO #115890
Joseph L. Bierwirth, Jr., BBO #564071
250 Summer Street
Boston, MA 02110
(617) 439-7500

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed June 2, 1997]

MARK J. FOURNIER,
Plaintiff,

V.

CHARLES REARDON, individually and in his capacity as Sheriff for the County of Essex, FRANK COUSINS, in his capacity as Sheriff for the County of Essex, JOHN W. O'BRIEN, in his capacity as Commissioner for Essex County, CHRISTOPHER T. CASEY, in his capacity as Commissioner for Essex County, MARGUERITE P. KANE, in her capacity as Commissioner for Essex County, TIMOTHY G. DONAHUE, SCOTT M. ROCHEVILLE, S. MICHAEL BACKRY, THOMAS GOFF, and MARK W. SCHMINK,
Defendants.

COMPLAINT
CA NO.
97-CV-11230
-JLT

COMPLAINT

Introduction

The plaintiff, a corrections officer for the County of Essex, sustained serious personal injuries on May 2, 1995, as a result of being handcuffed and placed under "House Arrest" by his superior, the defendant Sergeant Timothy G. Donahue, while in the course of the plaintiff's training at the Essex County Sheriff's Department Corrections Academy. The plaintiff brings this action pursuant to G.L.c. 12, §III, and 42 U.S.C. §1983, based upon the defendants' deprivation of, and interference with, rights of the plaintiff secured by the laws or constitution of the United States or by the laws or constitution of the Commonwealth of Massachusetts.

Now comes the plaintiff and complains as follows:

Parties

1. The plaintiff Mark J. Fournier resides at 348 Rantoul Street, Beverly, Essex County, Massachusetts.

2. The defendant Charles Reardon resides at 18 Marion Road, Salem, Essex County, Massachusetts, and is named herein individually and in his capacity as Sheriff; at all times material hereto the defendant Reardon was acting within the scope of his official duties or employment as the duly elected sheriff for the County of Essex and as the keeper of jails and superintendent of houses of correction within Essex County.

3. The defendant Frank Cousins has a usual place of business at 20 Manning Avenue, Middleton, Essex County, Massachusetts, and is named herein as the duly appointed

sheriff for the County of Essex and as the keeper of jails and superintendent of houses of correction within Essex County.

4. The defendant John O'Brien has a usual place of business at 36 Federal Street, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment as a commissioner for the County of Essex.

5. The defendant Christopher T. Casey has a usual place of business at 36 Federal Street, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment as a commissioner for the County of Essex.

6. The defendant Marguerite P. Kane has a usual place of business at 36 Federal Street, Essex County, Massachusetts, and at all times material hereto was acting within the scope of her official duties or employment as a commissioner for the County of Essex.

7. The County of Essex is a duly created political subdivision of the Commonwealth of Massachusetts and has a usual place of business at 36 Federal Street, Salem, Massachusetts.

8. The defendant Timothy G. Donahue resides at 36 Jersey Street, Marblehead, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment.

9. The defendant Scott M. Rocheville resides at 28 Crowdis Street, Salem, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his

official duties or employment.

10. The defendant S. Michael Backry resides at 13 Delaware Avenue, Danvers, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment.

11. The defendant Thomas Goff resides at 15 Mansfield Place, Lynn, Essex County, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment.

12. The defendant Mark W. Schmink has a usual place of business at 16 Liberty Street, Essex County, Middleton, Massachusetts, and at all times material hereto was acting within the scope of his official duties or employment.

Facts

13. On or about May 2, 1995, and at all times material hereto, the plaintiff was a corrections officer at the Essex County Correctional Facility, and as such was an employee of the defendant County of Essex under the supervision of the defendant Reardon as keeper of jails and superintendent of houses of correction within Essex County.

14. On or about said date, and at all times material hereto, the defendant Reardon in his capacity as keeper and superintendent aforesaid was operating and maintaining a basic training academy for correctional personnel, which training academy was known as the Essex County Sheriff's Department Corrections Academy (the "Academy"). The defendant Thomas Goff was the director of operations under

the defendant Reardon, which operations included the Academy. The defendant Major S. Michael Backry was the Academy Director. The defendants Lieutenant Scott Rocheville, Lieutenant Mark Schmink and Sergeant Timothy Donahue were all instructors at the Academy.

15. On May 1, 1995, the plaintiff reported as a recruit to the Academy to begin a nine week basic training course. Successful completion of the basic training course was a pre-requisite to the plaintiff continuing in his permanent, full-time employment as a corrections officer. There were approximately 20 other corrections officers who were also recruits in the basic training course with the plaintiff.

16. On May 2, 1995, while performing classroom work at the Academy, the plaintiff was ordered to report to the Academy training staff office. The plaintiff so reported. The plaintiff entered the training staff office without first requesting permission to do so. Present in the staff office were the defendants Donahue, Rocheville and Schmink.

17. The defendant Donahue reprimanded the plaintiff for entering the staff office without first requesting permission to do so. The defendant Donahue then ordered the plaintiff to leave the staff office. The plaintiff did so. The defendant Donahue then ordered the plaintiff to turn around and bend over. The plaintiff did so. The defendant Donahue then placed handcuffs on the plaintiff behind the plaintiff's back and informed the plaintiff that he was being placed under "House Arrest" for entering the staff office without first requesting permission. After then inserting written reports into the plaintiff's mouth, the defendant Donahue ordered the plaintiff back to his seat in the classroom and ordered the plaintiff to

redo the reports in his mouth.

18. The defendants Rocheville and Schmink observed defendant Donahue place the plaintiff under "House Arrest."The defendants Rocheville and Schmink were in a position of authority, and had the opportunity, to prevent or object to defendant Donahue placing the plaintiff under "House Arrest", yet they made no attempt to do so by word or by deed. The defendants Rocheville and Schmink approved, condoned and acquiesced in the plaintiff being placed under "House Arrest."

19. Approximately five minutes after being placed under "House Arrest" and while still handcuffed, the defendant Donahue entered the classroom and ordered everyone to stand at attention, including the plaintiff. All recruits stood at attention, including the plaintiff. The defendant Donahue then ordered all recruits to sit in their seats. The plaintiff attempted to seat himself as previously instructed. However, because his hands were handcuffed behind him, the plaintiff missed his chair and fell to the ground, sustaining serious personal injuries, including a fractured vertebrae.

20. The use of "House Arrest" as described herein was part of the basic training course administered by the training staff of the Academy. The use of "House Arrest" as a part of said course served only to intimidate, punish, injure, humiliate and embarrass recruits, was arbitrary and capricious, and did not serve or advance any legitimate interest of the sheriff or the County of Essex.

21. Prior to May 2, 1995, the defendants Reardon,

O'Brien, Casey, Kane, Backry and Goff in their official capacities for the County of Essex knew or should have known of the use of "House Arrest" as part of the Academy basic training course administered by the Academy training staff, and yet each of said defendants encouraged, tolerated, condoned or acquiesced in such use or each was recklessly or callously indifferent toward stopping such use.

Count One
(Violation of G.L.c. 12, §lll vs. Donahue)

22. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

23. The defendant Donahue, by his statements and acts as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Donahue, together with attorney's fees.

Count Two
(Violation of G.L. c. 12, §lll vs. Reardon)

24. The plaintiff repeats and realleges paragraphs 1

through 21 as if fully set forth herein.

25. The defendant Reardon, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Reardon, together with attorney's fees.

Count Three
(Violation of G.L.c. 12, §lll vs. Cousins)

26. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

27. The defendant Cousins, in his capacity as the duly appointed Sheriff, keeper of jails and superintendent of houses of correction, as successor to the defendant Reardon, in such capacity is liable for said predecessor's interference or attempted interference by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or constitution or laws of the Commonwealth of Massachusetts,

to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Cousins, together with attorney's fees.

Count Four
(Violation of G.L.c. 12, §lll vs. O'Brien)

28. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

29. The defendant O'Brien, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant O'Brien, together with attorney's fees.

Count Five
(Violation of G.L.c. 12, §lll vs. Casey)

30. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

31. The defendant Casey, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Casey, together with attorney's fees.

Count Six
(Violation of G.L.c. 12, §lll vs. Kane)

32. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

33. The defendant Kane, by her actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest

in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Kane, together with attorney's fees.

Count Seven
(Violation of G.L.c. 12, §lll vs. County of Essex)

34. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

35. The defendant County of Essex, by the statements, actions or inactions aforesaid of the other defendants, established, condoned, tolerated, or was recklessly and callously indifferent to, the use of "House Arrest" as part of the Academy's basic training course. Accordingly, the County of Essex has interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Count Eight
(Violation of G.L.c. 12, §lll vs. Rocheville)

36. The plaintiff repeats and realleges paragraphs 1 through 20 as if fully set forth herein.

37. The defendant Rocheville, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Rocheville, together with attorney's fees.

Count Nine
(Violation of G.L. c. 12, §lll vs. Backry)

38. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

39. The defendant Backry, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Backry, together with attorney's fees.

Count Ten
(Violation of G.L.c. 12, §III vs. Golf)

40. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

41. The defendant Goff, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Goff, together with attorney's fees.

Count Eleven
(Violation of G.L.c. 12, §III vs. Schmink)

42. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

43. The defendant Schmink, by his actions and inactions as aforesaid, interfered or attempted to interfere by threats, intimidation or coercion with the exercise or

enjoyment by the plaintiff of rights secured to the plaintiff by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth of Massachusetts, to wit: his right to be free of physical restraint or punishment, to be secure in his person against unreasonable seizure, not to be arbitrarily deprived of his liberty or of his property interest in his employment, without due process of law, and to be free from serious bodily injury in training programs.

Wherefore, the plaintiff demands damages against the defendant Schmink, together with attorney's fees.

Count Twelve
(Violation of 42 U.S.C. §1983 vs. Donahue)

44. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

45. The statements and acts of the defendant Donahue were made and committed by Donahue acting under color of state law.

46. The statements and acts of the defendant Donahue deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Donahue.

Count Thirteen
(Violation of 42 U.S.C. §1983 vs. Reardon)

47. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

48. The actions and inactions of the defendant Reardon were made and committed by Reardon acting under color of state law.

49. The actions and inactions of the defendant Reardon deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Reardon.

Count Fourteen
(Violation of 42 U.S.C. §1983 vs. Cousins)

50. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

51. The defendant Cousins in his present capacity as Sheriff for Essex County and as keeper of the jails and superintendent of houses of correction within Essex County is liable for the actions or inactions of his predecessor acting under color of state law.

52. The defendant Cousins in such capacity is liable to the plaintiff as a result of the actions and inactions of the defendant Reardon which deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Cousins.

Count Fifteen
(Violation of 42 U.S.C. §1983 vs. O'Brien)

53. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

54. The actions and inactions of the defendant O'Brien were made and committed by O'Brien acting under color of state law.

55. The actions and inactions of the defendant O'Brien deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant O'Brien.

Count Sixteen
(Violation of 42 U.S.C. §1983 vs. Casey)

56. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

57. The actions and inactions of the defendant Casey were made and committed by Casey acting under color of state law.

58. The actions and inactions of the defendant Casey deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Casey.

Count Seventeen
(Violation of 42 U.S.C. §1983 vs. Kane)

59. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

60. The actions and inactions of the defendant Kane were made and committed by Kane acting under color of state law.

61. The actions and inactions of the defendant Kane deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Kane.

Count Eighteen
(Violation of 42 U.S.C. §1983 vs. County of Essex)

62. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

63. The actions and inactions of the defendants as aforesaid established, condoned, and tolerated the use of "House Arrest" as part of the Academy's basic training course for the defendant County of Essex. All of the said actions and inactions were made and committed under color of state law.

64. The aforesaid actions and inactions on behalf of the defendant County of Essex deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant County of Essex.

Count Nineteen
(Violation of 42 U.S.C. §1983 vs. Rocheville)

65. The plaintiff repeats and realleges paragraphs 1

through 21 as if fully set forth herein.

66. The actions and inactions of the defendant Rocheville were made and committed by Rocheville acting under color of state law.

67. The actions and inactions of the defendant Rocheville deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Rocheville.

Count Twenty
(Violation of 42 U.S.C. §1983 vs. Backry)

68. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

69. The actions and inactions of the defendant Backry

were made and committed by Backry acting under color of state law.

70. The actions and inactions of the defendant Backry deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Backry.

Count Twenty-One
(Violation of 42 U.S.C. §1983 vs. Goff)

71. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

72. The actions and inactions of the defendant Goff were made and committed by Goff acting under color of state law.

73. The statements and acts of the defendant Goff

deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Goff.

Count Twenty-Two
(Violation of 42 U.S.C. §1983 vs. Schmink)

74. The plaintiff repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

75. The actions and inactions of the defendant Schmink were made and committed by Schmink acting under color of state law.

76. The actions and inactions of the defendant Schmink deprived the plaintiff of federal constitutional rights as follows:

a. his right to be secure in his person against unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments;

b. his right to be free from physical restraint as guaranteed by the Fourteenth Amendment;

c. his right to liberty in his person and property as guaranteed by the Fourteenth Amendment; and

d. his property rights in his employment as guaranteed by the Fourteenth Amendment.

Wherefore, the plaintiff demands damages, together with attorney's fees, against defendant Schmink.

Count Twenty-Three
(Punitive Damages under 42 U.S.C. §1983 vs. Donahue)

77. The plaintiff repeats and realleges paragraphs 1 through 21, 45 and 46 as if fully set forth herein.

78. The conduct of defendant Donahue as aforesaid was motivated by evil motive or intent, or involved reckless or careless indifference to the federally protected rights of the plaintiff.

Wherefore, the plaintiff demands punitive damages, together with attorney's fees, against defendant Donahue.

Count Twenty-Four
(Punitive Damages under 42 U.S.C. §1983 vs. Rocheville)

79. The plaintiff repeats and realleges paragraphs 1 through 21, 66 and 67 as if fully set forth herein.

80. The conduct of defendant Rocheville as aforesaid was motivated by evil motive or intent, or involved reckless or careless indifference to the federally protected rights of the plaintiff.

Wherefore, the plaintiff demands punitive damages, together with attorney's fees, against defendant Rocheville.

Count Twenty-Five
(Punitive Damages under 42 U.S.C. §1983 vs. Backry)

81. The plaintiff repeats and realleges paragraphs 1 through 21, 69 and 70 as if fully set forth herein.

82. The conduct of defendant Backry as aforesaid was motivated by evil motive or intent, or involved reckless or careless indifference to the federally protected rights of the plaintiff.

Wherefore, the plaintiff demands punitive damages, together with attorney's fees, against defendant Backry.

Count Twenty-Six
(Punitive Damages under 42 U.S.C. §1983 vs. Schmink)

83. The plaintiff repeats and realleges paragraphs 1 through 21, 75 and 76 as if fully set forth herein.

84. The conduct of defendant Schmink as aforesaid was motivated by evil motive or intent, or involved reckless

or careless indifference to the federally protected rights of the plaintiff.

Wherefore, the plaintiff demands punitive damages, together with attorney's fees, against defendant Schmink.

Count Twenty-Seven
(Punitive Damages under 42 U.S.C. §1983 vs. Reardon)

85. The plaintiff repeats and realleges paragraphs 1 through 21, 48 and 49 as if fully set forth herein.

86. The conduct of defendant Reardon as aforesaid was motivated by evil motive or intent, or involved reckless or careless indifference to the federally protected rights of the plaintiff.

Wherefore, the plaintiff demands punitive damages, together with attorney's fees, against defendant Reardon.

THE PLAINTIFF DEMANDS A JURY TRIAL

Respectfully submitted,
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Supreme Court, U.S.
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No. 98-1264

In The

Supreme Court of the United States

October Term, 1998

MARK J. FOURNIER,

Petitioner,

v.

CHARLES REARDON, Individually and in his capacity as Sheriff for the County of Essex, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court Of Appeals For The First Circuit's decision that the allegations of the petitioner's Complaint failed to state a claim under 42 U.S.C. § 1983 for which relief can be granted so far departed from the accepted and usual course of proceedings as to call for an exercise of the Court's supervisory power.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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ARGUMENT IN OPPOSITION TO THE PETITION

The Petition Does Not Demonstrate That The Court Of Appeals Decision And Order So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of The Court's Supervisory Power.

The petitioner asserts, in support of his claim to further appellate review, that the Court of Appeals decision and Order dismissing his Complaint, for failure to state a claim for which relief can be granted under 42 U.S.C. § 1983, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power. Contrary to the petitioner's claim, examination of the subject decision discloses that the Court of Appeals decision and Order was consistent with the usual course of judicial proceedings and that further review is unnecessary. Furthermore, the challenged decision is of no transcendent significance to the operation of our federal system which might providently call for expenditure of the Court's limited resources, but is significant only to the present parties. Accordingly, the Court should deny the petition.

A. The Court Of Appeals Decision Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings.

The Court of Appeals decision manifests sound legal reasoning and a reliance on applicable law, both of which supported dismissal of the petitioner's claim. In holding that the allegations of the Complaint did not plead that an unconstitutional unreasonable "seizure" of the

petitioner by the respondents occurred, the court declined to persist in the fiction that an alleged instance of hazing which was incidental to the petitioner's training at a correctional officers' training academy was an unconstitutional "seizure." Stated another way, the Court of Appeals was unwilling to consider the respondents' alleged conduct an unconstitutional "seizure" where the Complaint did not allege that the petitioner was not free to leave and where "all of the circumstances surrounding the incident" were not such that "a reasonable person [in the petitioner's place] would have believed that he was not free to leave."

The petitioner's argument in support of his petition, and his argument before the Court of Appeals, depend on the errant presumption that the allegations of his Complaint, bolstered by the reasonable favorable inferences afforded to parties opposing a motion to dismiss, mandate the conclusion that the petitioner was subjected to an unconstitutional seizure. The petitioner's argument failed before the Court of Appeals, and must fail on his Petition For Writ Of Certiorari, because the inferences procedurally afforded him in his defense of the motion to dismiss do not include all conceivable inferences, but are limited to *reasonable* inferences. The petitioner is not procedurally entitled to benefit from "purely conclusory allegations, indulge in rank speculation, or draw improbable inferences" to defeat a motion to dismiss. *See National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir.), *cert. denied* 515 U.S. 1103, 115 S.Ct. 2247 (1995). In finding that a "reasonable observer . . . would not believe that Fournier was not free to call an end to the 'house arrest,' " the Court of Appeals decided that the inference

upon which the continuing viability of the petitioner's claim depended was not a reasonable inference, and that the allegations of the Complaint fell short of pleading the deprivation of the petitioner's federal civil rights necessary to support recovery under 42 U.S.C. § 1983.

The Court of Appeals was correct in deciding that the Complaint does not allege, nor does it support the reasonable inference that the respondents effected an unconstitutional unreasonable seizure of the petitioner. "[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). In each instance in the Complaint where the event which gives rise to the petitioner's claim is described as "House Arrest," the petitioner placed the term "House Arrest" in quotation marks, presumably to acknowledge that the procedure described by the petitioner was something other than an actual arrest. The Complaint alleges that the petitioner attended the basic training course as "a prerequisite to the petitioner continuing in his permanent, full time employment as a corrections officer." The Court of Appeals was aware that the petitioner had been a corrections officer for over ten (10) years before he entered the academy because this fact was argued in the petitioner's brief to the Court of Appeals. The Complaint alleges that the petitioner was informed at the time of the alleged seizure that he was being treated in that manner "for entering the staff office without first requesting permission," and that the petitioner was ordered "back to his seat in the classroom [with the other corrections officer

recruits] and ordered . . . to redo the reports in his mouth." From these facts and others alleged in the Complaint and argued to the Court of Appeals, the Court of Appeals reasonably concluded that "a reasonable observer would conclude that Fournier was the subject of improper hazing, which might give rise to a state law claim . . . but would not believe that Fournier was not free to call an end to the "house arrest" and have the handcuffs removed."

The Complaint does not allege that the petitioner was not free to leave, though the petitioner contends that this was an inference reasonably to be drawn from the allegations of the Complaint. The Court of Appeals disagreed. Based upon "all of the circumstances surrounding the incident," the Court of Appeals declined to allow the petitioner the unreasonable inference that "a reasonable person [in the petitioner's place] would have believed that he was not free to leave." The Court of Appeals' decision was reasonable and proper, and no further appellate review is necessary.

B. The Court Of Appeals Decision Does Not Have Importance To The Operation Of Our Federal System Which Warrants Further Review By The Court.

The Court should deny the petition because the challenged decision lacks importance which extends beyond the parties to this litigation. Since the Court's ability to hear and devote attention and resources to cases having obvious and lasting significance to the operation of our

nation's federal system would be compromised by allocation of the Court's resources to cases having importance only to parties directly affected by their outcome, the Court should deny this petition.

Certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271 (1916); *see Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 531, 77 S.Ct. 459, 463 (1957) (Frankfurter, J., dissenting). Consideration of the present petition must be undertaken in view of "the volume and complexity of the cases [submitted to the Court by Petition For Writ Of Certiorari] which obviously call for decision by this Court, and . . . the time and thought that the proper disposition of such cases demands." *Rogers*, 352 U.S. at 531, 77 S.Ct. at 463. The Court's power to control its docket, bestowed by Congress at the Court's request, "carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. *Id.* The decision in the present case holds no importance to the operation of our federal system, though the outcome of the case is obviously significant to the parties affected by the Judgment.

The Court of Appeals decision reports that court's application of a general rule of civil procedure to facts unique and specific to one instance of alleged wrongdoing between the petitioner and respondents. The decision holds no novel application of federal law which may have broad application to persons who may govern their

conduct by any rule set forth in this decision. The significance of the decision, if any, is that 42 U.S.C. § 1983 does not create substantive rights but rather provides a vehicle for the protection and vindication of rights secured by the United States Constitution or by federal law. *Baker v. McCollan*, 443 U.S. 137, 146 n.3, 99 S.Ct. 2689, 2695 n.3 (1979). This principle needs no amplification or repetition.

Since the Court of Appeals decision lacks lasting importance to the operation of the federal system, the Court's resources would be better spent on matters of lasting and substantial significance properly before the Court. Further appellate review is not necessary or warranted in the present case.

CONCLUSION

Issuance of a Writ of Certiorari and further review of the Court of Appeals decision is unnecessary and would serve no wise and useful purpose, since the Court of Appeals decision does not depart from the accepted and usual course of judicial proceedings. Notwithstanding of the petitioner's evident disappointment with the outcome of his lawsuit, the Court of Appeals acted appropriately and within its authority in deciding that the Complaint failed to state a claim for which relief can be granted. Even if the petitioner were correct in asserting that the Court of Appeals erred in construing the Complaint as it did, such an error would consist of no more than an erroneous factual finding or misapplication of the Federal

Rules of Civil Procedure, which lacks precedential significance sufficient to transcend the present case and to warrant the Court's attention.

Respectfully submitted,

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